Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	))))	MB Docket No. 05-311
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COMMENTS OF THE
DISCOVERY INSTITUTE'S
TECHNOLOGY & DEMOCRACY PROJECT

Discovery Institute's Technology and Democracy Project (TDP), founded in 1990, is a non-profit think tank which supports technology as the key engine for economic growth and seeks to free its natural advancement from the burdens of undue government regulation. Our current focus includes realizing the economic and quality-of-life promise of real broadband to American homes by removing the regulatory morass that continues to stunt its growth. In our own research and writing we explore the transformational capacity of new technologies in both the public and private sectors, and we support the work of outside experts who share our philosophy on matters of interest. TDP Fellows' fields of particular expertise include telecommunications and economic policy.

TDP hereby submits these comments regarding the necessity of streamlining the cable franchise process to promote rapid broadband deployment.[1]

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[1] The views expressed herein are those of the author and do not necessarily reflect the opinions of the Discovery Institute.

I. INTRODUCTION & SUMMARY

The cable franchise process is a vestige of a long-gone monopoly era that appears to be imposing unacceptable delays and significant costs on new entrants in video. As such, it constitutes a barrier to entry that should ultimately be eliminated. In the meantime, the Commission should streamline the franchise process to ensure that competitive entrants are not thwarted.

On a per capita basis, the U.S. lags behind several other industrialized nations in the deployment of broadband networks. The gap is increasing. This is a competitiveness issue and a consumer issue.

The so-called "triple-play" of voice, video and data services offers great promise in attracting capital, but investors are nervous. The most important step the Commission can take to jump start broadband deployment is to streamline, at a minimum, the anachronistic cable franchise process.

II. BROADBAND ENHANCEMENT PROMOTES COMPETITIVENESS AND CONSUMER WELFARE

Broadband deployment in the U.S. lags behind several other industrialized countries both of terms of speed and penetration. For example, Internet service providers in South Korea offer 20 mbps, 50 mbps and now 100 mbps broadband connections,[2] while in the U.S., telecommunications carriers typically offer 768 kbps, 1.5 mbps or 3 mbps (cable operators may offer higher speeds, albeit in a shared network setting). The ITU reports that in 2005 there were

[2] *Top Technologies That Will Dominate 2006,* Chosun Ilbo, Jan. 2, 2006, available at <http://english.chosun.com/w21data/html/news/200601/200601020002.html>; *Telecom Race Moves Into 100 Mbps Lane,* Chosun Ilbo, Feb. 10, 2006, available at <http://english.chosun.com/w21data/html/news/200602/200602100004.html>

24.9 broadband subscribers per 100 inhabitants in South Korea versus 11.4 in the U.S.[3] The ITU statistics show that this gap has been growing.

According to Senior Fellow George Gilder,

> "The Korean example proves that broadband can be robust, popular, and profitable. It also shows that when new broadband connections are deployed, Internet usage in the United States will undergo a surge of traffic comparable to the 100-fold rocket of 1995 and 1996."[4]

Cable operators have invested approximately $100 billion since 1996 upgrading their networks. Wireless and wireline telephone companies have also made significant investments. Although suitable for voice and data applications, the prevalent U.S. transmission speeds are still far short of what is required for robust Internet video.

The cable industry invested in response to the competitive threat posed by Direct Broadcast Satellite (DBS) providers and the telecom providers responded to the broadband offerings of the cable operators. All of that investment was fueled by varying degrees of deregulation, which provided greater predictability of investment returns.

Where telecommunications carriers have offered video services, expanded basic cable rates have fallen, according to GAO,[5] and broadband speeds have increased. Cablevision launched new products offering 30 mbps and 50 mbps in response to Verizon's entry in New York while Cox bumped its speeds up to 9 mbps at no extra charge in six markets.[6]

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[3] *See ITU's New Broadband Statistics for 1 January 2005,* available at http://www.itu.int/osg/spu/newslog/ITUs+New+Broadband+Statistics+For+1+January+2005.aspx. *See also OECD Broadband Statistics,* Dec. 2004 (OECD found that the rate in South Korea was 24.9 versus 13 in the U.S., available at: http://www.oecd.org/document/60/0,2340,en_2649_34225_2496764_1_1_1_1,00.html#Graph1

[4] George Gilder, *Making Broadband Bloom,* Business 2.0, Sept. 1, 2003.

[5] General Accounting Office, *Wire-Based Competition Benefited Consumers in Selected Markets,* GAO-04-241, Feb. 2004.

[6] Alan Breznick, *Cablevision Boosts Broadband Speeds to Record,* Cable Digital News, Jan. 2006, available at http://www.cabledatacomnews.com/jan06/jan06-4.html

III. THE FRANCHISE PROCESS IS A BARRIER TO ENTRY THAT IS INHIBITING RAPID BROADBAND DEPLOYMENT

It is tempting to assume that competitive necessity will force telephone companies to continue to offer video services regardless of any conditions imposed by franchise authorities or delays inherent in the franchising process. But telecommunications carriers report widespread difficulty obtaining franchises. Moreover, the investment climate is not what it was in the late 1990s. While it is true telephone companies must invest in video services in order to remain competitive, their ability to do so will depend on the availability of capital. The problem is investors are skeptical that the massive investments currently contemplated by the telephone companies will yield meaningful and predictable returns within a reasonable timeframe, in large part because of the role of local franchising authorities.[7]

Unfortunately, the issue is usually framed in terms of commercial rivalry, as if this were a matter of the success or failure of particular commercial enterprises. The issue is really whether a franchise process that was designed to regulate long-gone monopolies is appropriate in a market in which consumers have competitive alternatives and whether it will advance the goal of attracting investment. Supporters of the franchise process offer no evidence that it is or that it will.

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[7] *See, e.g.,* Holman W. Jenkins, Jr., *That 1999 Show: Return of the 'Open Access' Wars,* Wall Street Journal, Nov. 16, 2005 ("Investors are full of foreboding about [Verizon's] expensive and risky plan to run fiber into millions of homes and businesses …. It faces an uphill political fight to win permission to sell its broadband TV offering from local cable franchise boards in 10,000 communities."); Arshad Mohammed, *Verizon Lays It on the Line*, Washington Post, Feb. 1, 2006, at D01 ("Seidenberg is faced with deep skepticism on Wall Street about Verizon's multibillion-dollar investment in a fiber-optic network"); Steve Rosenbush, *Cisco on IPTV "When, Not If,"* BusinessWeek online, Feb. 7, 2006 ("Wall Street is worried about the ability of [AT&T and Verizon] to deliver a good return on their fiber investment"); and Dan Caterinicchia, *Microsoft chief sees TV, phone online,* Washington Times, Dec. 8, 2005 ("providers such as Verizon and AT&T will have to convince consumers that IPTV is more attractive than their cable or satellite offerings").

Local governments lack the national and global perspective needed to establish sensible communications policy in the Internet age. They also face a serious conflict of interest. Cities face mounting costs for unrelated necessities like Medicaid and education, the growth of which is largely determined by policies at the Federal and state levels, and local officials have essentially been reduced to the role of tax collectors.

Large communications providers are easy prey for local tax collectors. They don't vote, cannot easily remove themselves from the local jurisdiction and are perceived to have deep pockets. Railroads used to face the same dilemma. In the 1970s, Congress found a history and a pattern of discriminatory taxation against railroads by States and localities and determined that these practices unreasonably burdened and discriminated against interstate commerce. Congress prohibited assessments and rates that were higher for the railroads than other commercial and industrial concerns.[8]

Local taxation aimed specifically at cable operators contributed to rising cable rates and led Congress to set the current 5 percent cap. Local officials hoped to heap special taxes on DBS, but it lacked physical presence and in the 1996 Act Congress wisely intervened. More recently, local government viewed competitive entrants in the local exchange market as no different from shopping malls or the Alaska pipeline[9] – captive businesses with deep pockets. The local attitude threatened to sabotage investment, innovation and competition. The Commission was forced to preempt in some cases and hold open the possibility of preemption in others.

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[8] 49 U.S.C. §11501.

[9] *See Initial Comments of the National Association of Telecommunications Officers and Advisors ("NATOA") and the Texas Coalition of Cities for Utility Issues ("TCCFUI")*, In the Matter of Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications, Docket No. 011109273-1273-01, Before the U.S. Dept. of Commerce, National Telecommunications and Information Administration, Dec. 19, 2001, at fn. 61, available at http://www.ntia.doc.gov/ntiahome/broadband/comments2/natoa/natoa.htm

Although franchise fees are capped at 5 percent of gross revenues, video providers are also required to make significant in-kind contributions to obtain franchise approval. The value of these contributions is subject to *no* limit, however it is claimed that they average 3 percent of gross revenues.[10] In-kind contributions add significant costs which providers must recover through higher prices, lower investment returns or both. As such, they are inconsistent with the goal of rapid deployment of broadband networks. Ideally, the value of in-kind contributions should count toward the 5 percent cap or at least be subject to a reasonable limit.

In-kind contributions are pernicious because they make maintenance of the current franchising regime especially appealing to local governments. Although franchise authorities are prohibited from unreasonably withholding a second franchise, they are subject to *no* deadlines. The absence of reasonable deadlines provides the leverage for local authorities to extract in-kind contributions and makes a mockery of Congress' desire to facilitate competition.

IV. ESTABLISH MAXIMUM TIMEFRAMES

The Commission's tentative conclusion that Section 621(a) prohibits not only refusals to award competitive franchises but also procedures or other requirements that have the same effect (either by creating unreasonable delays or imposing unreasonable regulatory roadblocks) is a logical and necessary starting point. As a threshold matter, telecommunications carriers are already subject to statewide franchise requirements anyway, and local officials are free to enact ordinances to protect consumers, ensure public and governmental access, require that city streets be returned to their original condition and ensure other legitimate needs. A franchise process is not needed at all.

The Commission's ultimate objective ought to be to forbear from enforcing the requirement for any competitor to obtain a franchise. In the meantime, the Commission should,

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[10] *See* Letter from U.S. Conference of Mayors, Jan. 25, 2005, at 2, available at http://www.usmayors.org/74thWinterMeeting/telecomrewrite_012506.pdf

at a minimum, address maximum timeframes to ensure that franchise approvals occur within a matter of months. A more desirable approach from an investment perspective would be to allow applicants to construct their facilities and offer service while franchise negotiations proceed.

V. LEVEL-PLAYING-FIELD REQUIREMENTS ARE ANTICOMPETITIVE

Build-out requirements were an appropriate *quid pro quo* for the telephone, cable and wireless companies who received an *exclusive franchise*. An exclusive franchise ensured the viability of average pricing by eliminating the risk of cherry-picking by a competitive entrant, and allowed providers to serve the most profitable customers first who could then, in turn, subsidize the cost of serving everyone else.

Competitive entrants already have an incentive to expand their networks: They must produce consistent revenue gains, and the cost of adding additional users declines as a network grows. But unless flexibly and intelligently applied, a build-out requirement threatens the entire undertaking by creating the possibility that the initial investment will be effectively lost if, for whatever reason, it just isn't possible to meet the deadline. The evidence that cities possess the inclination to perform this thoughtful and delicate task role is entirely conjectural.

Build-out is typically not required of competitive entrants, because it imposes costs that may not be recoverable in a competitive market. Exceptions are Personal Communications Service (PCS) providers and Eligible Telecommunications Carriers (ETCs). However, these examples are clearly distinguishable. As the Commission has noted in another context, the grant of a PCS license confers on the licensee an *exclusive right* to use a designated portion of the electromagnetic spectrum.[11] In that decision, the Commission rejected a Texas build-out requirement applicable to competitive entrants in the local exchange market.

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[11] *See Public Utility Commission of Texas*, CCBPol 96-13, *Opinion and Order*, FCC 97-346 (rel. Oct. 1, 1997) at 43.

ETCs are required to provide service and advertise their rates throughout the area for which they seek Universal Service support, but an ETC has the the right to resell another carrier's services.[12] There is no suggestion in the current proceeding that telephone companies seeking to offer video services should have the right to resell the services of the incumbent cable operator, nor should there be. However, in view of the fact that telephone companies cannot be assured of the capital needed to build out their advanced services networks, a resale requirement would probably be the only practical way ensure that a competitive entrant could serve every household.

Build-out is not the same thing as redlining. Redlining is illegal, but by its terms, 47 U.S.C. §621(a)(4)(A) does not require build-out. It merely imposes a reasonableness requirement on the amount of time locally-enacted build-out requirements provide for the competitive entrant to serve every household. There is no Congressional mandate for build-out.

Since cable operators are not required to offer voice services to every household, it is not clear why telephone companies should be required to offer video services throughout their service area. There is no way to predict whether competitive entrants will have access to sufficient capital or be able to gain enough market share to make build-out requirements objectively reasonable. These risk factors suggest that build-out requirements would be anticompetitive.

VI. CONCLUSION

Closing the gap between the deployment of broadband networks in the U.S. versus our international competitors should be a top priority. This is a competitiveness issue and a consumer issue.

[12] 47 U.S.C. §

Telecommunications carriers will have to overcome investor skepticism in order to be able to invest massively in video services. The unnecessary delays and significant costs imposed by the outdated cable franchise process are a barrier to entry that fans investor nervousness. Streamlining and ultimately eliminating the franchise process is the most important step the Commission can take to jump start broadband deployment

Respectfully submitted,

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